

REDACTED DECISION – DOCKET NO. 11-357 P

**By: A. M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON SEPTEMBER 5, 2012
DECISION ISSUED ON FEBRUARY 13, 2013**

SYNOPSIS

TAXATION -- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- “If the Tax Commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7(a) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Tax Commissioner did not err in investigating and issuing an assessment against this Taxpayer because this Taxpayer failed to make returns during the years 2001 to 2010.

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The returns which the Petitioner filed in 2012 were deficient or otherwise erroneous.

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “Each record shall consist of the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question, including bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account, and all schedules or working papers used in connection with the preparation of tax returns.” W. Va. Code R. § 110-15-14a.2 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Petitioner did not keep complete and accurate records consisting of the normal books of account ordinarily maintained by the average prudent person engaged in the activity of operating a store or operating an appraisal/estate sale business.

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against her is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Petitioner failed to present any evidence that the Tax Commissioner had better information, which he did not use, regarding the Petitioner's income from the S corporation antique store or her appraisal/estate sale business.

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF NOT MET -- The Petitioner has not met her burden of showing that the assessment issued against her was erroneous, unlawful, void or otherwise invalid

FINAL DECISION

On September 6, 2011, the Auditing Division of the West Virginia State Tax Commissioner's Office (hereinafter the Tax Commissioner or Respondent) issued an Audit Notice of Assessment, against the Petitioner, Ms. A (hereinafter the Petitioner). This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The assessment was for personal income tax for the period of January 1, 2001, through December 10, 2010, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. Written notice of this assessment was served on the Petitioner, as required by law.

Thereafter, on October 28, 2011, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petition was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. The Petitioner resides in a West Virginia City, in a West Virginia county.
2. The Petitioner was the president of a corporation, Company A. Company A was a West Virginia corporation formed in 1997. The purpose of the corporation was to operate an antique store in a West Virginia County. In June of 2003, Company A became an S corporation.
3. Sometime in the fall of 2010, the corporation came to the attention of the Criminal Investigation Division (CID) of the West Virginia Tax Department, when it was discovered that it was operating without a business registration certificate.
4. Along with the CID investigation, an auditor with the Tax Department began an audit of the Petitioner.¹ This audit revealed that neither the Petitioner nor the S corporation had filed income tax returns with the West Virginia State Tax Department for at least ten years. The auditor also discovered that the Petitioner was operating another business, as a sole proprietor, called Company B.
5. The auditor attempted to conduct a traditional audit of both businesses, but she was unable to, due to a lack of accurate records.
6. This lack of records forced the auditor to conduct a “best information available” audit, as those terms are used in Section 14b.4 of Title 110, Series 15 of the West Virginia Code of State Rules.

¹ Because the Petitioner was the president of the S corporation that ran the antique store, the investigation of the store led to an investigation of her personal income taxes.

7. The auditor sought to ascertain the Petitioner's income from the two businesses², from different sources. For the antique store, she reviewed the sales of three similarly situated stores which were operating in the local area. Specifically, she took the sales tax remitted by the three stores, added it together, divided by three and extrapolated that average amount to arrive at an average amount of sales. The auditor did this for each year of the audit period, starting in June of 2003, when the antique store switched from a C corp. to an S corp. The auditor did not take any of the expense information from the three sample stores. As a result, when arriving at the estimated sales figures for Company A, the auditor did not give the store any "credit" for its expenses.

8. To arrive at the income for Company B, the auditor looked at a national pay scale web site called PayScale.com. There she took four occupations, auctioneer, estate appraiser, jewelry appraiser, and real estate and property consultant, added up the average annual wages for those occupations and divided by four. The income amount that this calculation generated was \$_____.

9. For 2001 and 2002, the auditor just attributed the \$61,729.00 to the Petitioner as personal income. For 2003, she prorated the income from the antique store, starting in June, and added it to the \$61,729.00. For the remaining years of the audit she added the income from the store, which, as stated above, varied from year to year, to the \$61,729.00 Company B's income. These income amounts led to the assessment that forms the basis of this matter.

10. After the assessment was issued, the Petitioner filed West Virginia personal income tax returns for the tax years at issue, 2001 through 2010.

² The testimony in this matter revealed that the Petitioner was involved in three businesses. The third, a consulting company, was not part of the auditor's calculations in arriving at income figures for the Petitioner.

DISCUSSION

The Tax Commissioner's ability to investigate when a person does not file tax returns is well settled.

If the tax commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.

W. Va. Code Ann. §11-10-7(a) (West 2010). Here, the Petitioner does not really dispute the fact that she did not file West Virginia income tax returns for the years covered by the assessment. The Petitioner testified that she relied on her accountant, now deceased, to file her taxes every year. She further testified that she never saw copies of these returns, and could not say for certain that they were, in fact, filed. As a result, the Petitioner does not argue that the Tax Commissioner was wrong to investigate and issue an assessment. Nor does the Petitioner argue that the Tax Commissioner erred by attributing the S corporation's sales to her, in the form of personal income. Rather, the Petitioner's complaints involved the quality of the Tax Commissioner's investigation.

Section 14a of Title 110, Series 15 of the West Virginia Code of State Rules lays out the record keeping requirements of business people in the state, "Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes." W. Va. Code R. § 110-15-14a.1 (1993). Section 14a contains detail about the type of records the Tax Commissioner will consider complete and accurate, stating:

Each record shall consist of the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question, including bills, receipts, invoices, cash register tapes,

or other documents of original entry supporting the entries in the books of account, and all schedules or working papers used in connection with the preparation of tax returns.

Id., at 14a.2.

Further, “[I]f records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

The auditor testified at length that she was never provided with any records (for either business) that even came close to being characterized as “complete and accurate”. The Petitioner argued at hearing that the auditor should have contacted the Petitioner directly, rather than using a Criminal Investigation Division employee as a go between. The Petitioner suggests that if the auditor had contacted her directly, better records would have been forthcoming. This Tribunal finds that argument to be unpersuasive, because hearings before the Office of Tax Appeals are *de novo*. See W. Va. Code Ann. §11-10A-10(b) (West 2010).

A *de novo* hearing allows a Petitioner (with some limits) to introduce any evidence he or she sees fit. The Petitioner filed her Petition with the Office of Tax Appeals on October 28, 2011, and the matter went to hearing on September 5, 2012. During the ten months between those two dates the Petitioner was free to introduce any records which would have accurately shown the extent of her business operations. No such records were produced, and the Petitioner testified that no such records would be produced. “**JUDGE POLLACK:** *Okay. So everything that you do have access to as of today’s hearing you’ve provided?* **Ms. A:** *Yes.*” See Transcript p. 50. The Petitioner testified that she could not produce some of her records because they were at her deceased accountant’s office and she could not gain access to them. As for other records, such as bank statements, the Petitioner was noncommittal, indicating that they may have been lost in some move.

The Petitioner has been assessed almost one hundred thousand dollars. A reasonably prudent person, facing such a tax bill, would have made a much greater effort to obtain records that could lessen this bill. The Petitioner's complete failure to produce one single financial document leads this Tribunal to believe that no such documents exist. Therefore, this Tribunal rules that the Petitioner did not keep "the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question" W. Va. Code R. § 110-15-14a.2 (1993).

The only remaining issue to be decided is, did the Petitioner meet her burden of proof in showing that the Tax Commissioner did not use the best information available when issuing the assessment. At the evidentiary hearing, counsel for the Petitioner cross examined the Tax Commissioner's auditor, and questioned her regarding the sales/income attributed to the antique store. Specifically, he questioned why she used sales information from three similarly situated stores, but neglected to use the expense information from those same stores.³

The Petitioner has the burden of proof. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010). Stated differently, the Tax Commissioner's assessment is presumed to be correct. Thus, when a taxpayer is assessed, it must prove that the assessment is incorrect. As part of its burden of proof, a Petitioner must present evidence to show the Tax Commissioner's alleged errors. Thus, it is part of the Petitioner's burden of proof to show that it correctly reported its sales or, having incorrectly reported its sales, must provide some credible evidence to support its position; the key word being "evidence". Here, the Petitioner complains about the auditor's failure to attribute expenses to the antique store, but offered no evidence as to what those expenses should have been, despite the fact that an accountant testified on the Petitioner's behalf. The accountant never even testified that this omission by the auditor was a problem, let alone offered evidence as

³ The Petitioner offered no complaints regarding the income the auditor attributed to Company B.

to what the proper attribution of expenses should have been. As such, the Petitioner has not met her burden of showing that the Tax Commissioner failed to use the best information available when issuing the assessment against her.

Lastly, it should be noted that the Petitioner did file West Virginia personal income tax returns for all the years of the assessment. However, these returns were filed after the commencement of this administrative proceeding. As a result, they suffer from the same infirmity discussed above, namely that they are not accompanied by any reliable documents verifying the income figures listed on the returns. The Petitioner's accountant witness testified that these returns were based upon "worksheets" provided by the Petitioner and that he saw no other financial documents to verify the Petitioner's true income. As a result, this Tribunal finds the Petitioner's tax returns, all filed in 2012, to be unreliable indicators of her true tax liabilities. We so find, because "worksheets" whereby a business person writes down on a piece of paper how much money they purportedly earned, are not "the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question" W. Va. Code R. §11-15-14a.2 (1993).

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. "If the Tax Commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly

remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7(a) (West 2010).

4. The Tax Commissioner did not err in investigating and issuing an assessment against this Taxpayer because this Taxpayer failed to file returns during the years 2001 to 2010.

5. The returns which the Petitioner filed in 2012 were deficient or otherwise erroneous.

6. “Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

7. “Each record shall consist of the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question, including bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account, and all schedules or working papers used in connection with the preparation of tax returns.” W. Va. Code R. § 110-15-14a.2 (1993).

8. “If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

9. The Petitioner did not keep complete and accurate records consisting of the normal books of account ordinarily maintained by the average prudent person engaged in the activity of operating a store or operating an appraisal/estate sale business.

10. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax

against her is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

11. The Petitioner failed to present any evidence that the Tax Commissioner had better information, which he did not use, regarding the Petitioner's income from the S corporation antique store or her appraisal/estate sale business.

12. The Petitioner has not met her burden of showing that the assessment issued against her was erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Audit Notice of Assessment, issued against the Petitioner on September 6, 2011, for personal income tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____, is hereby **AFFIRMED**.

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to the West Virginia Code Section 11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date Entered